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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 734

DANIEL M. CORY and MARGOT CORY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

Opinions Below

The opinion of the Tax Court (App. 4-App. 12) is reported in 29 T. C. 903. The opinion of the Court of Appeals (App. 13-App. 18) is reported in 59-1 USTC para. 9137.

Jurisdiction

The judgment of the Court of Appeals was entered on December 1, 1958 (App. 19). The jurisdiction of this Court is invoked under Sec. 240A of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

The sole question presented is whether the deficiency was barred by limitation, because the deficiency letter was not mailed within one year after the determination of the Tax Court for 1944 became final on the issue here involved.

Relevant Statutes

1954 Internal Revenue Code

"SEC. 1311. CORRECTION OF ERROR.

"(a) GENERAL RULE.—If a determination, (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314. (26 U. S. C. 1952 ed., Supp. II, Sec. 1311, p. 687)

* * * *

"SEC. 1313—DEFINITIONS.

"(a) DETERMINATION.—For purposes of this part, the term 'determination' means—

"(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final;"

(26 U. S. C. 1952 ed., Supp. II, Sec. 1311, pp. 687, 688)

* * * *

"SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(1) *Timely Petition For Review Not Filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) *Decision Affirmed Or Petition For Review Dismissed.*—

* * * *

(B) *Petition For Certiorari Denied.*—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the United States Court of Appeals;"

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7481, p. 960)

* * * *

"SEC. 7483. PETITION FOR REVIEW.

"The decision of the Tax Court may be reviewed by a United States Court of Appeals

as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U. S. C. 1952 ed., Supp. II, Sec. 7483, p. 961)

* * * *

Statement

The following quotations from the opinion of the Court of Appeals sufficiently state the case for present purposes:

"On this review of a Tax Court decision finding a deficiency of $15,204.97 in their income tax for 1945, petitioners rely on the statute of limitations. Although the notice of deficiency was issued December 20, 1956—more than ten years after the return was filed—the Tax Court found the assessment timely under I. R. C. 1954, Secs. 1311-1314, 26 U. S. C. Secs. 1311-1314, which under stated conditions allow an additional one-year period for assessment of tax upon certain items of income. 29 T. C. No. 96. The petitioners now challenge this ruling.

In their 1944 return taxpayers had reported as long-term capital gains the receipt of $[illegible]057.66 in royalty income from the autobiography, 'Persons and Places' of the noted philosopher-poet George Santayana. All but $12,000. of these royalties, however, were held in escrow until the

following year because of a dispute between taxpayers and a nephew of the author over title to the manuscript. Some years later, asserting that they received only $12,000. in 1944 and the remainder in 1945, petitioners claimed a tax refund. The Commissioner rejected their claim and also determined that the entire amount reported in the 1944 return was taxable as ordinary income, rather than long-term capital gain. In a decision finally entered on June 17, 1955, the Tax Court upheld the Commissioner's determination that the royalties were taxable as ordinary income, but ruled that petitioners received only $12,000. in 1944, as they contended. Petitioners sought review of this decision; but the Commissioner did not, and his time to do so expired on October 17, 1955. We affirmed the decision March 9, 1956, *Cory* v. *C. I. R.*, 2 Cir., 230 F 2d 941, and certiorari was denied October 8, 1956, 352 U. S. 828. The Commissioner issued a notice of deficiency on December 20, 1956, for the $30,257.66 royalties not reported for the year 1945."

* * * *

"The Tax Court has accepted the Commissioner's view that there was such a determination here which became final only on the denial of certiorari on October 8, 1956; and hence the notice of deficiency on December 20, 1956, was timely. The taxpayers deny that their position was ever 'inconsistent', but say that in any event the court's determination as to them became final on October 17, 1955, when the Commissioner failed to file a cross-petition for review of the court's decision of June 17, 1955. Under this view the notice of deficiency would of course be too late."

* * * *

"Respondent must and does concede that the ruling that petitioners received only $12,000. in 1944 did become final on that date. For the Commissioner could not obtain review of that ruling unless he cross-petitioned for review. *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250-251; *LeTulle* v. *Scofield*, 308 U. S. 415, 421-422. Nevertheless, to break down a Tax Court decision for a single year into separate holdings and issues for decisional and assessment purposes would add to the confusion and complexity in operating under 26 U. S. C. Paras. 1311-1314. See *Rosenthal* v. *C. I. R.*, 2 Cir., 205 F. 2d 505, 512; *Wilson* v. *C. I. R.*, 42 B. T. A. 1254. In this very case petitioners' construction of these sections would have compelled the Commissioner to institute a proceeding for the 1945 deficiency, while a modification of the Tax Court decision in the still pending prior action would have completely altered the parties' positions in the second proceeding. Accordingly we hold that the real 'determination' required by the statute was not had until judicial opinion was resolved into a final adjudication of the monetary assessments involved, and hence that the reassessment is timely under the statutes."

* * * * *

"But I. R. C. 1954, Secs. 1312 (3) (A) speaks only of 'an item included in a return,' not an amount includible in gross income. Accordingly, while the amount of error in the gross income which the taxpayers computed and reported in the 1944 return may be lower, the item included in that return which was the subject of the error is unquestionably the amount of royalties which

they reported as received. Since they reported receipt of $42,363.57, even though they claimed that only half their gain was to be taken into account, the amount thus omitted from the 1945 return was $30,363.57, as the Tax Court has held."

Reasons for Granting the Writ

The decision below is contrary to the decision of this Court in *Helvering* v. *Pfeiffer, supra.* And the effect of the decision is a wrong interpretation of an important provision of the Internal Revenue Code, which in the public interest should be correctly settled by this Court.

To justify its refusal to follow the *Pfeiffer* case, the Court of Appeals asserts that "to break down a Tax Court decision for a single year into separate holdings and issues for decisional and assessment purposes would add to the confusion and complexity in operating under 26 U. S. C. Secs. 1311-1314." But this assertion (which has no support either in the record or in common sense) is belied almost every week in the Treasury Department's own bulletins, which frequently indicate acquiescence in one or more issues decided by the Tax Court and non-acquiescence in other issues passed upon in the same decision for the same year. For example, in Internal Revenue Bulletin No. 1957-1, dated Jan. 7, 1957, p. 9, footnotes 6 and 7 show "acquiescence" limited to a particular issue of an income tax "decision" covering a single year, while footnote 14 similarly limits "non-acquiescence" to two particular issues involved in a single decision regarding estate tax liability. And in this

very case the Commissioner announced his acquiescence in the Tax Court's decision on September 6, 1955, before his time to petition for review expired, thus expressly recognizing the divisibility of the issues involved.

The opinion below suggests that if the *taxpayers'* 1944 appeal had succeeded it "would have completely altered the parties' position in the second proceeding." On the contrary, there was nothing to prevent the Commissioner from acting at once to propose a deficiency based on his view of the proper interpretation of the mitigating provisions, with the certainty that any income in excess of $12,000., to the extent of the taxpayers' inconsistent treatment of it in 1944, was taxable in a later year. Here the Commissioner would doubtless have initially claimed, as he did later, that the amount to be added was $30,057.66. If petitioners' appeal had been sustained, this amount would have to be reduced by at least one-half. But if petitioners' alternative position below had been sustained, this would have been equally true even though petitioners' 1944 appeal failed. This alternative point therefore still remained to be decided, and accordingly the Commissioner actually made no progress by delaying his determination for more than a year. In any event, this circumstance seems irrelevant to the holding below, which applies equally even if the only remaining issue in the case not finally determined is a wholly unrelated item such as the disallowance of a charitable contribution. For in that case also, the exact amount of the deficiency (to which the courts below attribute an almost mystical significance) could not be precisely known until the extraneous issue was finally deter-

mined. If the Supreme Court granted *certiorari* and sent the case back to the Tax Court for further findings, this might according to the theory below toll the statute of limitations for several times as long as the Congress evidently intended.

Even if the Court of Appeals were justified in its belief that in fixing the period of limitation for the same year as that involved in the "decision" of the Tax Court, the "decision" had an esoteric unity which forbade its dissection into its component parts, this doctrine (if we understand it correctly) could not apply to the determination of the tax in another taxable year or years, such as is required by sections 1311-1314 of the Code. For the application of these provisions necessarily demands analysis of the digits in which the earlier "decision" is expressed so as to ascertain the particular issue and the corresponding item which correction of inconsistency requires to be taken into account in other taxable years. And as the opinions below in this case indicate, the amount of the "item" may be different in the year of ultimate taxability from its amount in the year of primary exclusion, because the word "item" is used in the statute in a qualitative rather than a quantitative sense (App. 18).

It is difficult to understand the holding of the Court of Appeals that "the real 'determination' required by the statute was not had until judicial opinion was resolved into a final adjudication of the monetary assessments (sic) involved, and hence that the reassessment is timely under the statutes." There was of course only *one* "monetary assessment" for 1944, and the fig-

ure so computed had no logical or arithmetical bearing on the correct "reassessment" for 1945 or any other years which might have been re-opened by the "final determination" made earlier, that only $12,000. could be taxed in 1944. Since "item" has only a qualitative meaning, it is obvious that whatever practical difficulties may be avoided by a precise "monetary assessment" for 1944, as to that year alone, such difficulties cannot be so avoided with respect to the other years, which are subject to the extraordinary and strictly limited special "mitigation" provisions.

The Congress fully realized that mitigation seriously disturbed the repose otherwise assured by the statute of limitations, and limited this inconvenience by the requirement that the aggrieved party must act within one year. The decision below extends this period to one year after the final determination of wholly extraneous issues, so that the supposedly short limitation period would in many cases exceed the normal three-year period, with the additional disadvantage that both the Commissioner and the taxpayer would be completely helpless to act while the extraneous litigation took its course.

We believe that the decision below is in direct conflict with this Court's decision in *Helvering* v. *Pfeiffer*, *supra*, as well as with the clear expression of the Congressional intent. But if there were any doubt or ambiguity as to the latter, we submit that the legislative history would remove it.

The *Pfeiffer* decision, expressly holding that decisions of the Board of Tax Appeals became final against the non-petitioning party regardless of the

other party's actions, was handed down December 6, 1937. The "mitigating" provisions first were enacted in the 1938 Revenue Act. The pertinent Report of the Finance Committee of the Senate (where the mitigating sections were first proposed) was calendared April 5, 1938 (1939-1 C. B. p. 779). It stated (p. 815):

> "Inasmuch as an adjustment should not be made until the inconsistent position asserted by the taxpayer or the Commissioner has been successfully maintained, subsection (b) is not operative until there is a final 'determination' which gives authoritative sanction to the inconsistent action. Subsection (a) describes the types of determination which are prerequisite to the operation of this section."

The Conference Committee report, submitted May 11, 1938, contains similar language (1939-1 C. B. p. 817, at p. 835). It states further:

> "Subdivision (A) thereof, referring to closing agreements, and subdivision (B), referring to court and Board decisions, cover conventional determinations the finality of which is governed by existing provisions of law."

How could any "determination" give more "authoritative sanction" than a Tax Court decision clearly settling the relevant issue, which neither the Court of Appeals nor the Supreme Court could possibly change? And when the Conference Report refers to "existing provisions of law," must it not be assumed that the Committee had in mind the decision of this Court made only five months before?

Apart from the fact that the decision below seems irreconcilable with *Helvering* v. *Pfeiffer*, *supra*, we believe that its erroneous interpretation of the statutory meaning raises an important question of Federal law which this Court should establish. The opinion of the Court of Appeals acknowledged "the confusion and complexity in operating under 26 U. S. C. Secs. 1311-1314." This is borne out by the large and increasing volume of litigation in the courts concerning these provisions. It seems clear that it is of great importance that these vexing complexities be straightened out as soon as possible, as the Congress intended, and not prolonged for additional years by a strained ruling that accepts the finality of an unappealed determination of the Tax Court for every purpose except the short period of limitation prescribed by Section 1313. There seems to be no rational basis for this peculiar exception.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WATSON WASHBURN
Counsel for Petitioners

WASHBURN & GRAY
Of Counsel

February 26, 1959.

APPENDIX

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Docket Entries

(page 1 of Record)

THE TAX COURT OF THE UNITED STATES

Docket No. 65590

DANIEL M. CORY and MARGOT CORY, his wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioners: WATSON WASHBURN, Esq.

For Respondent: JOHN A. DUNKEL, Esq.

1957

Jan 22—Petition received and filed. Taxpayer notified. Fee paid.

Jan 28—Copy of petition served on General Counsel.

Feb 15—Answer filed by Respondent. Served 2/26/57.

Feb 15—Request for Circuit hearing in New York filed by Respondent. 2/25/57 Granted.

Mar 28—Hearing set June 3, 1957—New York, N. Y.

Jun 6—Hearing had before Judge Tietjens on the merits. Submitted. Briefs due Aug. 5, 1957. Reply briefs due Aug. 26, 1957.

Docket Entries

1957

Jun 21—Transcript of hearing—June 6, 1957 filed.

Jul 11—Motion for extension of 150 days from date of trial to file brief, filed by Petitioner. 7/15/57—Granted. Original briefs due 11/4/57. Reply Briefs due 11/25/57.

Jul 18—7/11 Motion Served.

Jul 29—Motion for leave to file amendment to answer, amendment to answer lodged, filed by Respondent. 8/1/57—Granted.

Aug 5—Motion and amended answer of July 29 served.

Sep 10—Reply to amended answer filed. Served 9/11/57.

Oct 2—Motion by respondent to correct transcript. Granted, correction made. Served 10/8/57.

Nov 1—Brief for Petitioner filed. Served 11/5/57.

Nov 4—Brief for Respondent filed. Served 11/5/57.

Nov 15—Reply Brief for Petitioner filed. Served 11/26/57.

Nov 25—Reply Brief for Respondent filed. Served 11/26/57.

1958

Feb 18—Findings of Fact and Opinion filed, Judge Tietjens, Decision will be entered for respondent.

Feb 25—Decision entered, Judge Tietjens.

Apr 24—Petition for Review by U. S. C. A., 2nd. filed by Petitioner.

Apr 24—Proof of Service filed.

Decision

(page 153 of the Record)

THE TAX COURT OF THE UNITED STATES

WASHINGTON

(Emblem)

Docket No. 65590.

DANIEL M. CORY and MARGOT CORY, his wife,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed February 18, 1958, it is

ORDERED AND DECIDED: That there is a deficiency in income tax in the amount of $15,204.97 for the calendar year 1945.

Enter:

(Signed) NORMAN O. TIETJENS
Judge.

ENTERED Feb 25 1958

(Seal)

Findings of Fact and Opinion

(pages 143-152 of Record)

29 T. C. No. 96

TAX COURT OF THE UNITED STATES

[SAME TITLE]

Docket No. 65590. Filed February 18, 1958.

SECTIONS 1311-1314, I. R. C. of 1954, MITIGATION OF LIMITATIONS—The Petitioners received $12,000 in 1944 and some $30,000 in 1945 as proceeds from publication of a book. They reported $42,000 as received in 1944 as capital gains and none in 1945. Later they claimed a refund for 1944 alleging they received only this amount in such year. Respondent determined a deficiency for 1944 holding the $42,000 was ordinary income in that year. The Tax Court held that the proceeds were ordinary income but that only $12,000 was received in 1944. 23 T. C. 775. This decision was affirmed, 230 F. 2d 941 (C. A. 2, 1956) and certiorari was denied October 8, 1956. In December 1956 respondent determined a deficiency for 1945. Petitioners plead the statute of limitations. *Held*: The position maintained by the petitioners that only $12,000 was received in 1944, which position was adopted in the determination of this Court, was inconsistent with the erroneous inclusion of $42,000 in their 1944 return. This determination required the exclusion of an item included in the 1944 return which was erroneously omitted from

the 1945 return. The determination became final October 8, 1956. The respondent's deficiency notice for 1945 to correct the error is authorized by sections 1311-1314, I. R. C. 1954.

Watson Washburn, Esq., for the petitioners.

John A. Dunkel, Esq., for the respondent.

TIETJENS, *Judge:* The respondent determined a deficiency in income tax in the amount of $15,204.97 for the calendar year 1945. The sole issue is whether sections 1311-1314 of the Internal Revenue Code of 1954 are applicable to mitigate the effect of the statute of limitations upon assessment of the deficiency.

The evidence consists of exhibits received at the hearing and the record in Docket No. 37209, which concerned a deficiency determined against these petitioners for 1944 and decided in (1955) 23 T. C. 775, together with the affirming opinion of the Court of Appeals for the Second Circuit (1956) 230 F. 2d 941, which the parties have agreed to incorporate herein. The facts found in the prior proceeding are restated here to the extent deemed necessary for the purpose of this opinion with additional findings from the further evidence introduced.

FINDINGS OF FACT

Daniel M. Cory received a gift from the author George Santayana in the form of the manuscript of Santayana's autobiography called "Persons and Places." Cory entered into an agreement in November 1942 with Charles Scribner's Sons for its pub-

lication with payment of royalties to Cory. A relative of the author, George Sturgis, disputed Cory's title to the manuscript. An agreement was reached in June 1943 between Cory, Sturgis and Scribner's, providing for payment of the royalties into escrow pending settlement of the dispute with payment of not over $12,000 to be made to Cory for the escrow fund.

In 1944 Scribner's paid $42,363.57 into the escrow fund and $12,000 of this amount was paid to Cory in 1944. The matter of Cory's title was settled in 1945 in his favor. The balance of the escrow fund as of January 1, 1945, was $30,363.57. An escrow fee of $105.91 was paid from this fund and the balance of $30,257.66 was distributed in 1945 as follows:

To Collector of Internal Revenue for account of Cory or Santayana	$12,709.08
To Scribner's (repayment of an advance to Cory)	1,500.00
To Cory	16,048.58

The petitioner's income tax return for 1944 reported $42,057.66 as net gain from the sale or exchange of an asset held for more than 6 months. This computation deducted the escrow fee and $200 "basis" from the total escrow fund. The return showed that Cory received only $12,000 of this in 1944. The return also reported $7 from the sale of 2 poems and $300 (of which $150 was taken into account) from the sale of an article. The return showed a tax due of $7,699.06. It reported payments of $16,429.34 on account including amounts withheld by Scribner's, the amount paid from the escrow fund to the collector and amounts

paid on declaration of estimated tax. The indicated overpayment of $8,730.28 was refunded to the petitioners during or after 1945. Attached to the return was a detailed statement in explanation of the transaction concerning the autobiography.

The petitioners filed a timely income tax return for 1945 with the collector of internal revenue for the third district of New York, reporting rents or royalties of $4,635.07 less legal expense of $902.33, and showing tax due of $563, tax withheld of $1,390.56 and refund due of $827.56.

In February 1948 the petitioners filed a claim for refund of income tax for 1944 in the amount of $7,699.06, the amount originally reported on their return as due. As one ground it was alleged that the gift to Cory may not have been complete during 1944 and the proceeds would be taxable only to Santayana. As another ground it was stated that since Cory received only $12,000 in 1944 only this amount should be taxable to the petitioners in that year.

In July 1951 the respondent determined a deficiency for 1944 in the amount of $13,770.50, holding that the amount of $42,057.66 received from Scribner's was taxable as ordinary income. The petitioners filed a petition with the Tax Court, Docket No. 37209, alleging as errors the finding that the taxpayers received $42,057.66 of taxable income from Scribner's in 1944, and the finding that the amount received was taxable as ordinary income and not as capital gain, and the failure to spread the income over 36 months pursuant to section 107 (b) of the Internal Revenue Code of 1939. The petition was later amended, alleging that the gift from Santayana was not complete until 1945

and any proceeds received in 1944 was not the petitioners' income.

In Docket No. 37209 we held (23 T. C. 775) that only $12,000 in proceeds from the publication was received by the petitioners in 1944 and that such proceeds were taxable as ordinary income and not capital gain. Decision was entered on June 17, 1955. The petitioners appealed the holding that the proceeds were taxable as ordinary income. The Court of Appeals affirmed on March 9, 1956, and certiorari was denied on October 8, 1956.

Opinion

The petitioners reported in their 1944 return that they had received some $42,000 in royalties which they treated as long term capital gains. Actually, they received $12,000 of this in 1944 and the balance in 1945, but none of this was reported in their 1945 return. In 1948 they claimed refund of 1944 tax paid on the ground, among others, that only $12,000 was received in 1944. In 1951 the respondent determined that the entire amount of royalties reported as received in 1944 was taxable as ordinary income. This Court sustained the respondent on this point but sustained the petitioners' contention that only $12,000 was received in 1944 and taxable in that year. In the present proceeding the respondent is attempting to tax as 1945 income the royalties received in 1945 which were not reported in that year. The notice of deficiency was issued December 20, 1956, more than 10 years after the return was filed. The petitioners plead the statute of limitations. Assessment is barred by

the statute of limitations unless section 1311 to 1314[1] of the Internal Revenue Code of 1954 permit assessment as correction of an error within the terms of those sections.

The position maintained by the petitioners in their claim for refund and in Docket No. 37209, that only $12,000 was received by them in 1944, from which it would necessarily follow that the remainder of the fund was received in 1945, was inconsistent with the

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[1] SEC. 1311. CORRECTION OF ERROR.

(a) General Rule.—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) Conditions Necessary for Adjustment.—

(1) Maintenance of an Inconsistent Position.—Except in cases described in paragraphs (3) (B) and (4) of section 1312, an adjustment shall be made under this part only if—

* * * *

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained * * * by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

* * * *

(3) Double Exclusion of an Item of Gross Income.—

(A) Items Included in Income.—The determination requires the exclusion from gross income of an item included

position taken in filing their returns, that $42,000 was received in 1944 and none of the royalties in 1945. This inconsistent position of the petitioners was adopted in the determination of the Tax Court in 23 T. C. 775. The determination required the exclusion of an item ($30,257.66) included in a return filed by the taxpayers for 1944 which was erroneously omitted from their return for 1945. The determination became final upon the denial of the petition for certiorari on October 8, 1956.[2] The deficiency notice

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in a return filed by the taxpayer or with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year, or from the gross income of a related taxpayer;

SEC. 1313. DEFINITIONS.

(a) Determination.—For purposes of this part, the term "determination" means—

(1) a decision by the Tax Court • • • which has become final;

SEC. 1314. AMOUNT AND METHOD OF ADJUSTMENT.

• • • • •

(b) Method of Adjustment.—The adjustment authorized in section 1311 (a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary or his delegate with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years, with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years.

[2] SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

• • • • •

(2) Decision Affirmed or Petition for Review Dismissed.—

• • • • •

(B) Petition for Certiorari Denied.—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the United States Court of Appeals;

mailed on December 20, 1956, was within the one year period provided in section 1314 (b) for making the adjustment authorized in section 1311 (a). The circumstances are within the terms of the statute and the correction of the error is authorized notwithstanding the statutory period of limitations has run.

The petitioners argue that since the respondent did not appeal from the Tax Court's determination that only $12,000 was taxable in 1944, that determination became final on October 17, 1955, 4 months after the entry of the Tax Court's decision, hence the notice of deficiency mailed December 20, 1956, was not sent within the 1 year after the determination became final (Section 1314 (b), and is barred, citing *Helvering* v. *Pfeiffer* (1937) 302 U. S. 247. This case stands for the proposition that an appellee cannot, without filing a cross appeal, attack the judgment of the lower court. But when the petitioners appealed the Tax Court's decision as to the year 1944, no part of it became final until the disposition of the appeal. *Morris K. Wilson,* 42 B. T. A. 1254 (1940). See also *Rosenthal* v. *Commissioner,* 205 F. 2d 505 (C. A. 2, 1953). After the petitioners appealed the respondent could not know whether the 1944 receipts would ultimately be taxable as capital gains or ordinary income and could not correctly determine a deficiency for 1945, until that point was decided. It would be impractical if the decision as to a single taxable year could be subdivided into several issues with varying limitation periods. We conclude that the deficiency notice here given was timely.

The petitioners also argue that their 1944 gross income reported amounted to only $21,028.83 (50 per

cent of $42,057.66) and hence after the holding that only $12,000 was actually 1944 income, the excess of this, or $9,028.83, was the amount of gross income to be excluded from 1944 and allocated to 1945. The argument is without merit. The holding as to 1944 was that whatever was received in 1944 as proceeds of the book was ordinary income and that $12,000 was received in that year. Since the petitioners reported receipt of $42,363.57, even though they contended that only half was to be taken into account, the amount excluded was $30,363.57.

Decision will be entered for the respondent.

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 61—October Term, 1958.

(Argued November 6, 1958 Decided December 1, 1958.)

Docket No. 25192

DANIEL M. CORY and MARGOT CORY, his wife,
Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:

CLARK, *Chief Judge*,

WATERMAN, *Circuit Judge*, and GALSTON, *District Judge*.

On petition for review of a decision of the Tax Court of the United States, Norman O. Tietjens, *Judge*.

Daniel M. Cory and Margot Cory, husband and wife, petition for review of a decision of the Tax Court of the United States, 29 T. C. No. 96, finding a deficiency of $15,204.97 in their income tax for 1945. Affirmed.

WATSON WASHBURN, New York City, *for petitioners.*

MORTON K. ROTHSCHILD, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., and Lee A. Jackson, I. Henry Kutz, and George F. Lynch, Attys., Dept. of Justice, Washington, D. C., on the brief), *for respondent.*

CLARK, *Chief Judge:*

On this review of a Tax Court decision finding a deficiency of $15,204.97 in their income tax for 1945, petitioners rely on the statute of limitations. Although the notice of deficiency was issued December 20, 1956—more than ten years after the return was filed—the Tax Court found the assessment timely under I. R. C. 1954, §§ 1311-1314, 26 U. S. C. §§1311-1314, which under stated conditions allow an additional one-year period for assessment of tax upon certain items of income. 29 T. C. No. 96. The petitioners now challenge this ruling.

In their 1944 return taxpayers had reported as long-term capital gains the receipt of $42,057.66 in royalty income from the autobiography, "Persons and Places" of the noted philosopher-poet George Santayana. All but $12,000 of these royalties, however, were held in escrow until the following year because of a dispute between taxpayers and a nephew of the author over title to the manuscript. Some years later, asserting that they received only $12,000 in 1944 and the re-

mainder in 1945, petitioners claimed a tax refund. The Commissioner rejected their claim and also determined that the entire amount reported in the 1944 return was taxable as ordinary income, rather than long-term capital gain. In a decision finally entered on June 17, 1955, the Tax Court upheld the Commissioner's determination that the royalties were taxable as ordinary income, but ruled that petitioners received only $12,000 in 1944, as they contended. Petitioners sought review of this decision; but the Commissioner did not, and his time to do so expired on October 17, 1955. We affirmed the decision March 9, 1956, *Cory* v. *C. I. R.*, 2 Cir., 230 F. 2d 941, and certiorari was denied October 8, 1956, 352 U. S. 828. The Commissioner issued a notice of deficiency on December 20, 1956, for the $30,257.66 [1] royalties not reported for the year 1945.

Sections 1311-1314 of the Internal Revenue Code of 1954 follow the complicated form of expression which seems an occupational trait of revenue legislation. In summarized form they may be stated as allowing an additional year for assessment of a tax deficiency after a "determination"—defined in §1313(a)(1) as a decision of the Tax Court "which has become final"—correcting certain errors in tax returns. As applied to the present case the determination must be one which requires the exclusion from gross income of an item included in a return filed by the taxpayer which

[1] The $200 discrepancy in these figures seems to result from a payment of that amount for expenses of the publishers of "Persons and Places." The Tax Court included also a sum paid as escrow fee of $105.91. Taxpayers make no claim of error on these aspects of the determination.

was erroneously excluded from the gross income of the taxpayer for another year. Further, there must be adopted in the determination a position maintained by the taxpayer which is inconsistent with the erroneous exclusion in question. The Tax Court has accepted the Commissioner's view that there was such a determination here which became final only on the denial of certiorari on October 8, 1956; and hence the notice of deficiency on December 20, 1956, was timely. The taxpayers deny that their position was ever "inconsistent," but say that in any event the court's determination as to them became final on October 17, 1955, when the Commissioner failed to file a cross-petition for review of the court's decision of June 17, 1955. Under this view the notice of deficiency would of course be too late.

Clearly these sections are applicable here. The Tax Court's determination that only $12,000 was received in 1944 excluded the remainder of the reported royalties from taxpayers' gross income for that year, and this sum should have been reported for the taxable year 1945. Moreover, the decision did adopt a position maintained by the taxpayer which was inconsistent with the erroneous omission of the royalties in 1945. It is true that petitioners' 1944 return disclosed in full all the relevant facts surrounding their receipt of the royalties. But the fact remains that in that return they took the position that the entire sum was received in 1944, whereas in the later claim for refund they urged that they did not obtain $30,257.66 of these royalties until 1945. This is sufficient to bring 26 U. S. C. §§1311-1314 into play. Their language requires only inconsistency of position, not duplicity or

deception by the taxpayer. For the sections operate equally against inconsistent positions of the Commissioner; their purpose is remedial, not punitive.

On petitioners' further contention that 26 U. S. C. §§1311-1314 do not cure the untimeliness of the Commissioner's assessment because the one-year period began to run on October 17, 1955, respondent must and does concede that the ruling that petitioners received only $12,000 in 1944 did become final on that date. For the Commissioner could not obtain review of that ruling unless he cross-petitioned for review. *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250-251; *Le Tulle* v. *Scofield*, 308 U. S. 415, 421-422. Nevertheless, to break down a Tax Court decision for a single year into separate holdings and issues for decisional and assessment purposes would add to the confusion and complexity in operating under 26 U. S. C. §§1311-1314. See *Rosenthal* v. *C. I. R.*, 2 Cir., 205 F. 2d 505, 512; *Wilson* v. *C. I. R.*, 42 B. T. A. 1254. In this very case petitioners' construction of these sections would have compelled the Commissioner to institute a proceeding for the 1945 deficiency, while a modification of the Tax Court decision in the still pending prior action would have completely altered the parties' positions in the second proceeding. Accordingly we hold that the real "determination" required by the statute was not had until judicial opinion was resolved into final adjudication of the monetary assessments involved, and hence that the reassessment is timely under the statutes.

The final issue concerns the amount of additional income the Commissioner may attribute to 1945. The sections of the Code relevant here limit the reassessment to the increase or decrease in tax resulting

"solely from the correct treatment of the item which was the subject of the error." 26 U. S. C. §1314(a). This "item," petitioners contend, is not $30,257.66, the royalties petitioners mistakenly claimed they received in 1944, but at maximum half that sum, since on their 1944 return—because they treated the royalties as long-term capital gain—petitioners listed only half the amount of the royalties as gross income. In support of this position petitioners rely on numerous authorities interpreting I. R. C. 1939, §275(c), a penalty section operable only in favor of the Government. Section 275(c) extended the statute of limitations where a taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return." But I. R. C. 1954, §1312(3)(A) speaks only of "an item included in a return," not an amount includible in gross income. Accordingly, while the amount of error in the gross income which the taxpayers computed and reported in the 1944 return may be lower,[2] the item included in that return which was the subject of the error is unquestionably the amount of royalties which they reported as received. Since they reported receipt of $42,363.57, even though they claimed that only half their gain was to be taken into account, the amount thus omitted from the 1945 return was $30,363.57,[3] as the Tax Court has held.

The decision of the Tax Court is affirmed.

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[2] Thus petitioners claim that the amount erroneously included in their 1944 return and which should be included in their 1945 income is only $9,028.83, or $21,028.83 (50% of $42,057.66 royalties reported), less $12,000 allotted to 1944.

[3] Including the discrepancies referred to in note 1 *supra*.

Judgment

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of December one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. STERRY R. WATERMAN,
Circuit Judge

HON. CLARENCE G. GALSTON,
District Judge

Circuit Judges

DANIEL M. CORY and MARGOT CORY,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appeals from The Tax Court of the United States.

Judgment

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk